Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

TERM October 1993

OLIVER RAY MOORE, Petitioner

VS.

MEMBER DATA, Respondent

PETITION FOR WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

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United States Court of appeals for the Sixth Circuit No. 93-5647 Parties Oliver Ray Moore Plaintiff, appellant; Member Data, Defendant, appellee; Travelers Express, Defendant. MANDATE:

Pursuant to the Courts disposition that was filed 3-8-94 the mandate for this case hereby issues today

Filed April 18, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 93-5647.

ORDER:

"Upon consideration of the Pro se appellant's untimely petition for rehearing en banc, It is ORDERED that the petition not be accepted for filing."

Filed April 14, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 93-5647

Entry Date March 8, 1994

ORDER:

"Oliver Ray Moore appeals a district court order denying his motion for relief from judgement filed under Fed. R. Civ. P. 60(b)(3), in this action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, et seq. The case has been referred to a panel for the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R. App. P. 34(a).

Moore Sought reinstatement and damages in this suit alleging that he had been discharged on the basis of his race from his position as an Installation Specialist with the defendant corporation. On June 28, 1990,

Moore filed and amended complaint seeking to add Travelers Express Company, Inc. (Travelers Express), and Custom Computer Application, Inc. (CCA), as defendants. On July 9, 1990, the district court entered an order allowing the amendment. The district court subsequently dismissed Travelers Express and CCA in an order entered January 18, 1991.

On June 28 1991, the defendant moved for summary judgement, based on evidence that the discharge was because: (1 Moore never demonstrated technical competence with the computer software and hardware he was installing, 2) every customer credit union where he worked complained about he performance, 3) his co-worker had asked that they not be assigned to work with him, and 4) he disobeyed direct instructions and caused serious administrative problems. The district court granted defendant's

motion in order filed August 10, 1992; judgement was entered August 17, 1992. On August 17, 1992, Moore filed his motion for Relief from judgement Pursuant to Fed. R. Civ. P. 60(b)(3) on the basis that discovery was not complete and summary judgement was therefore, inappropriate. the district court denied the motion in an order entered April 5, 1993. This timely appeal followed.

This court reviews the April 5, 1993, order to determine whether the district court in its discretion in denying Moore relief under Rule 60(b). In re Salem Mortg. Co., 791 F.2d 456, 459 (6th Cir. 1986); Smith v. Secretary of health and Human Services, 776 F.2d 1330, 1332 (6th Cir. 1986); Windsor v. United States Dep't of Justice, 740 F.2d 6,7 (6th Cir 1984)(per curiam). The Underlying Judgement is not reviewed. An abuse for discretion exists when the

reviewing court is firmly convinced that a mistake has been made. See In re Bendictin, 857 F.2d 290, 307 (6th Cir. 1988), cert. Denied, 488 U.S. 1006 (1989);Schrand v. Federal Pac Elec. Co., 851 F.2d 152, 156-57 (6th Cir. 1988).

Upon review we conclude that the district court did not abuse its discretion by denying Moore's motion for relief from judgement filed pursuant to Fed.R. Civ.P 60(b)(3). Moore's 60(b)(3) Motion alleged facts similar to previous claims that the defendant failed to comply with discovery requests; nothing new was asserted. A magistrate judge determined on January 27, 1992 that, that Moore "ha[d] all the discovery materials requested that can be produced by the defendant" and Denied all motions challenging the completeness of discovery. the findings of the magistrate judge were adopted by order of the district court entered February

28, 1992, and each of Moore's exceptions to the magistrates judge's order was denied. A Rule 60(b) Motion must be denied if it is merely an attempt to re litigate previously decided issues. See Manstini v. American Tel & Tel. Co., 369 F.2d 378, 379 (2d Cir 1966), cert denied, 387 U.S. 933 (1967). The District court was well Satisfied, in the first instance, that discovery was complete. Because Moore did not offer any new grounds to justify relief but sought only to re litigate issues already decided, the district court acted within its considerable discretion by denying relief.

Accordingly, the district court's order is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit."

Filed March 8, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 92-6689

ORDER:

"This Matter has been referred to a panel of the Court. A review of the record indicates that the judgement of the district court was filed August 13 and entered August 17, 1992. A motion for relief from that order was served and filed August 17. The notice of appeal was filed on September, 4 1992.

This Court lacks Jurisdiction in this appeal. The motion for relief was served within 10 days of entry of the decision as calculated pursuant to Fed.R.Civ.P. 6(a). Because the Motion is construed as a Fed.R.Civ.P. 59(e) motion, it tolled the appeal period as provided by Fed R. App.P. 4(a)(4). See Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201, 206 (6th Cir. 1990); Kennedy v. City of Cleveland, 797 F.2d 297, 304-05 (6th Cir. 1986), cert.

denied 479 U.S. 1103 (1987); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 40-41 (2d Cir. 1982). A notice of appeal filed before disposition of a time tolling motion has no effect. A new notice of appeal must be filed within the prescribed time from the entry of the order disposing of the Motion. Osterneck v. Ernst & Whinney, 489 Uls. 169, 173-74 (1989); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982)(per curiam). The August 17 motion has not yet been ruled upon.

Accordingly, it is ORDERED that the appeal be, and it hereby is, dismissed for lack of jurisdiction. Rule 8(a), Rules of the Sixth Circuit."

Entered and Issued as Mandate July 9, 1993.

UNITED STATES COURT OF APPEALS - SIXTH CIRCUIT NO. 93-5647

District Court Entry: 177

NOTICE OF APPEAL & CAUSE FOR APPEAL:

"Comes Now the Plaintiff, Oliver Ray Moore, and to declare to this court A NOTICE OF APPEAL to Order entered in the United States District Court for the Western District of Tennessee Division as follows:

1. ORDER DENYING MOTION FOR RELIEF FROM JUDGEMENT DOCKET 176."

[CAUSE]

" The District Court Justice Lacks Jurisdiction to Rule on Motion while the sixth Circuit Court has Jurisdiction. The District Court Abused it's discretion. The district Court did not Seek leave to adjudge motion. Arguments are already before the Sixth Circuit Court of Appeals under CASE 92-

6689, still pending at this time. The District Court Justice has deprived the Plaintiff's appellant's rights as guaranteed by the constitution of the United State, the VII Amendment. Their are conflicting inferences. Their are Misconduct and outstanding penalty of perjury against the defendant. Summary Judgement is inappropriate. Sanctions are due the defendant. "

Entered May 3, 1993

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

DISTRICT ENTRY 176

Filed: April 5, 1993

ORDER: ORDER DENYING MOTION FOR RELIEF FROM JUDGEMENT

"This matter is before the Court on

plaintiff Oliver Ray Moore's motion for relief from the August 10, 1992, judgement of this Court dismissing the above-referenced case with prejudice. This motion is made pursuant to Federal Rule of Civil Procedure 60(b)(3) and requests that the previous order be vacated ant the case reopened for further proceedings and discovery. This motion does not raise and additional issues not already considered and rejected by the Court and is therefore, Denied.

SO ORDERED this 2 day of April, 1993"

Entered April 5, 1993.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Motion Filed By Plaintiff:

District Court entry 168

Title: Motion for Relief from judgement

of Court Pursuant to Fed. Rule. Civ. P. 60(b)(3).

" Comes Now the Plaintiff, Oliver Ray Moore, ProSe, pursuant to Fed. R. Civ.P. 60(b)(3) and Moves this court for relief form judgement and order filed in this court on August 10, 1992, on the grounds that the defendant's Misconduct, failure to disclose or produce materials requested in discovery, has foreclosed the full and fair preparation of the Plaintiff's case and that summary judgement is inappropriate. Whereas the Plaintiff Prays the that the Plaintiff be relieved from final judgement and DECREE and that the Order which Grants the Defendant's Motion for summary judgement be vacated and the order to dismiss this case with prejudice be vacated and deny the application for summary judgement and reinstate-reopen this case for further proceedings in

discovery."

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE

District Court entry: 167

JUDGEMENT IN A CIVIL CASE: CASE NUMBER 90-2005-M1/A

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the order entered August 10, 1992, this case is hereby DISMISSED

with prejudice.

Entered August 13, 1992

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF TENNESSEE

ORDER

DISTRICT COURT ENTRY 166

ORDER DISMISSING CAUSE WITH PREJUDICE.

This matter is before the Court on Motion of the defendant for Summary judgement filed on June 28, 1991, and the motion of the defendant for entry of an order granting summary judgement filed on July 28, 1992. Rule 8 of the Local Rules provides, under subsection (a), that responses to motions and supporting memoranda shall be filed within ten (10) days after service of

the motion. Rule 8(b) further states that "failure to respond timely may be deemed good grounds for granting the motion."

By order of the Court dated July 1, 1992, Plaintiff was explicitly directed to "respond in full to the pending motion for summary judgement within 10 days of entry," and notified that failure to do so would result in granting of the motion for summary judgement and dismissal of this case." since that time, the plaintiff has filed four additional motions which have been carefully reviewed by the court, among them a motion entitled "Response to RE:Member DATA (sic) Services Inc.' (sic) Motion for entry of order Granting Summary Judgement."

However, Plaintiff's response fails to address the defendants motion, and merely reiterates previous claims that the defendant has "failed to cooperate

in proceedings of discovery" as to plaintiff's Requests for Production number 5 and 9, and restates plaintiff's request for sanctions. The magistrate Judge determined on January 27, 1992 that, the plaintiff "ha[d] all the discovery materials requested that can be produced by the defendant, and denied all motions challenging the completeness of discovery. The findings of the magistrate judge were affirmed by order of the Court entered on February 28, 1992, and each of the plaintiff's exceptions to the magistrate judge's order were denied.

Defendant re:Member Data asserts that Oliver Ray Moore was Discharged not the basis of his race, but "because his work was not acceptable based upon company standards or norms." In defendant's motion for summary judgement, defendant sets out the facts that Moore was discharged because he

never demonstrated technical competence with the computer software and hardware he was installing (Affidavit of Sheryl Bombarry, @4; Exhibit b-1 to Affidavit of Sheryl Bomberry; Affidavit of Mark Walker, @8), every customer credit union where he worked complained about his performance (Affidavit of Mark Walker, @15 Affidavit of Sheryl Bomberry @4), his co-workers had asked that they not be assigned to work with him (Affidavit of Mark Walker, @19; Exhibit A-6 to Affidavit of Mark Walker), and he disobeyed direct instructions and caused serious administrative problems (Affidavit of Mark Walker, @7; Affidavit of Sheryl Bomberry, @5-6; Exhibit B-1 to Affidavit of Sheryl Bomberry, page 1; Exhibit D-1 to affidavit of Woodfrin G. Hays).

An adverse party may not rest on the mere allegations of the complaint but must respond by affidavit setting

forth specific facts showing that there is a genuine issue of fact for trial. Federal Rule of Civil Procedure 56(e). Rule 56(e) specifically goes on to provide "if the adverse party does not so respond, summary judgement, being appropriate shall be entered against the adverse Party."

Plaintiff has failed to submit a controverting affidavit on the issue of the performance-based grounds for discharge established by the defendant or offer evidence supporting a finding of racially discriminatory discharge. Therefore, it is established that Oliver Ray Moore was Discharged from his position as an installation specialist due to unacceptable job performance and not because of his race, and therefore, summary judgement should be entered.

Notwithstanding numerous extensions of time, plaintiff has merely repeated his exceptions to prior discovery

determinations and has failed to submit an appropriate response to defendant's motion for summary judgement as ordered by the Court. Plaintiff's claims regarding discovery were previously denied by the magistrate judge and affirmed by this court, and further exceptions to the magistrates judge's discovery order are not well taken.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants's motion be, and is hereby GRANTED, and that this cause be, and is hereby, DISMISSED with prejudice.

SO ORDERED this 7th day of August, 1992."

Fact Number 4

Attachment to District court entry 150.

Attachment to Appellant's Brief - Case 93-5647

Title: Letter From Defendant, Appellee, Respondent indicating Service of additional documents that are responsive to the Plaintiff, appellant, Petitioner's request for Production.

Date of Letter: FEBRUARY 7, 1992

"Mr. Oliver Ray Moore
5093 Whitworth
Memphis TN 38117

Dear Mr. Moore:

Enclosed please find copies of additional documents that are responsive to your request for production. These documents were produced to our offices this week. They relate to Installation Specialists.

Please call if you have any questions.

Sincerely,

Williams & Taylor

By Ann Carr Mackey

ACM/dlm

Enclosures

cc: re:Member Data Services, Inc."

United States District Court

Order Entry 145: "Order Denying Motion for Default, motion for Relief, and Motion For Sanctions"

"On December 22, 1991, Plaintiff, proceeding pro se, filed his motion for Default judgement, asserting that defendant has "failed to cooperate in proceedings of discovery: as to Plaintiff's Request for Production numbered 5 and 9. On December 23, 1991 plaintiff filed a Motion for Sanctions, asserting that defendant has "failed to cooperate in proceedings of discovery" as to plaintiff's Request for Production number 8 finally, on december 30, 1991, plaintiff filed his "Motion for Relief", in which he contends that defendants, in

defiance of orders of court, has delayed discovery; that plaintiff has "lost discovery"; and that, because of this, the court should "refuse" defendant's Motion for summary judgement.

As to the motion for default and for sanctions, it does appear that defendant has been derelict in its duty to fully respond to orders of this court, and that it is like pulling teeth to get defendant to produce information. However, as to the records of Alan Doyle, and plaintiff's concerns have at last been resolved as to Request number 8.

As to Request number 5 and 9, defendant, through counsel, has stated it has submitted all responsive documents in its possession, or to which it has access, and can find no others. Counsel for defendant has gone one step Further and has <u>verified</u> this response, subject to the penalty of perjury.

Without proof that counsel for defendant has lied under oath, or that defendant has violated FED.R.CIV. P. 11, this court has to assume that defendant has complied as best it can with the orders of this court.

Accordingly, Plaintiff's motion for default and his motion for sanctions are DENIED.

Plaintiff has also asked, in his "Motion for Relief", that because of defendant's delay in providing discovery, and because of the loss of discovery materials by plaintiff, this court should "refuse" defendant's motion for summary judgement.

As has been indicated before, plaintiff now apparently has all the discovery materials requested that can be produced by defendant. This court cannot help plaintiff with his problem of lost discovery. Plaintiff will be given forty-five (45) days from the date

of docketing of this order in which to respond to defendant's motion for summary judgement. This should be ample time for him to complete any discovery needed to respond to defendant's motion for summary judgement.

Under these circumstances, plaintiff's "Motion for Relief" is DENIED.

IT IS SO ORDERED.

ENTER THIS 24th Day OF JANUARY, 1992.

James H. Allen
United States Magistrate
Judge

AFFIDAVIT

AFFIDAVIT of Oliver Ray Moore,
Plaintiff, Appellant, ProSe

I, Oliver Ray Moore State in sound mind and body do state the following:

1. I do not have in my possession nor

have I ever been served Request for Production number 5, Kaiperm Federal Credit Union Pertchart from the Defendant, Re:Member Data, its counsel, or any one designated to serve this document.

2. At the time of the Trial Courts Consideration of Summary Judgement, I Could not identify Request for production number 9, I perceived conflicting facts and asserted to the best of my knowledge and interpretation of the rules of the court a conclusion and acted thereupon.

3. I have accumulated over 150 documents in support of the claims in the complaint and against the answers to the complaint.

4. I believe that every document

requested in the plaintiff Request for production will merit the plaintiff's case.

Oliver Ray Moore date 3-1-93

United States District Court

"ORDER ON MOTION TO COMPEL DISCOVERY"

Page 1 par 1.

Plaintiff Oliver Ray Moore, proceeding pro se, has served Interrogatories and request for production of documents upon defendant re: Member Data Services, Inc., and dissatisfied with some of the responses thereto , has filed, on August 23, 1991, a Motion for an Order compelling Discovery.

page 3 par 3-4.

Interrogatory number 26 asked whether Moore met "all goals

established in conjunction with task(sic) for conversion" as of his May 3, 1988, Performance Review. Defendant answered by saying that "Moore met the minimum goals of showing up every day and working hard". Plaintiff complains that this response is evasive. Plaintiff is correct. Defendant never answers whether Plaintiff met "all" goals, but merely says that plaintiff met "minimum" goals. Plaintiff has not been given a complete answer, and defendant must provide such an answer.

Page 3 par 5.

Interrogatory number 27 asked whether Moore Worked "Well as a member of conversion team" as of the May 3, 1988 Performance Review. Again, defendant's answer is incomplete, leaving room for <u>many</u> blanks to be filled in. For the

reasons above given, defendant must provide a more complete response.

page 5 par 2.

Request number 5 is said to have been produced, although plaintiff denies this. Defendant will have to see that Plaintiff gets the documents requested.

page 5 par 3-4.

Request number 6 asked for "all documents produced for any Tennessee Employment Security offices" Defendant Objected on grounds of relevancy.

The request is to broad, but defendant must produce all documents provided the Tennessee Employment Security office relating to plaintiff's termination by defendant and his subsequent effort to obtain unemployment security compensation.

Page 6 par 3-4.

Request number 9 Asked for all Custom Computer Applications, Inc., personnel files up until 1990". Defendant produced employee files of comparable employees (i.e., installation Specialists), and objected on relevancy grounds to further production.

Plaintiff has failed to show how this sensitive information would lead to the discovery of admissible evidence, and the position for the defendant is therefore well-taken.

page 6 par 5-end.

As to those discovery request, to which defendant is ordered to respond herein, this response must be made within twenty (20) days of the docketing of this order.

IT IS SO ORDERED.

Enter this 24th day of September, 1991.

James H. Allen. - United

States Magistrate Judge.

United States District Court

ORDER: ENTRY 101

ORDER OF REFERENCE

Presently before the court is plaintiff's Motion for Order Compelling Discovery, filed August 23, 1991.

IT IS SO ORDERED that the motion is referred to United States Magistrate Judge for a determination.

Any exceptions to the Magistrates Judge's order shall be made by motion within 10 days of the date of his order setting forth particularly those portions of the order excepted to and the reasons for the exceptions

Jerome Turner

United States District Judge

August 29, 1991

United States District Court

District Court entry 128

ORDER:

ORDER ON PARTIES' EXCEPTIONS TO ORDER ON MOTION TO COMPEL DISCOVERY

On September 26, 1991, the magistrate judge entered an Order on Motion to Compel Discovery to Which both parties have filed exceptions. The Court has reviewed the exceptions, including the parties' memoranda and responses, and finds that neither party has shown that the magistrate judge's order is clearly erroneous in any respect except as to the Request for Production No. 8. With respect to Request for Production No. 8, the court finds, in accordance with parties consent, that request should only apply to travel documents and travel that occurred during the time that CCA operated the company. The particular cut off date shall be identified by the defendant and the use of that particular date explained in the response to the

Request for production. The response to Request for Production No. 8 shall be limited to documents related to travel of installation specialist only to customer locations for installation and training. The defendant shall not be required to produce any invoices to customers for employee travel, but shall otherwise include all documents related to such employee travel.

In all other respects, the exceptions of the parties to the magistrate Judge's order are denied.

IT IS SO ORDERED this 19th day of November, 1991.

Jerome Turner

United States District Judge

United States district Court

Order Filed November 22,1991

ORDER ON MOTION TO EXTEND TIME

The Plaintiff has moved this court to extend the deadline for discovery

through January 31, 1992. The deadline for discovery has heretofore been extended to October 31, 1991, the deadline for the plaintiff's response to the defendant's Motion for Summary Judgement has been extended to December 31, 1991, and the time for plaintiff to file motions has also been extended to December 31, 1991.

The court does not feel that the extension through January 31, 1992 is appropriate or justified in this case.

The discovery deadline in this case shall be extended to December 20, 1991.

The Court Does not envision the granting of further requests for extension of time.

IT IS SO ORDERED THIS 19th day of November, 1991.

Jerome Turner

United States District Judge

United States District Court

Order ENTRY 126

Order Denying Motion for appropriate Sanctions.

Plaintiff has now moved the court for an order imposing sanctions against defendant herein for failure to comply with a previous discovery order of this court, relating to plaintiff's Interrogatories numbered 26 and 27, and plaintiff's Request for Production of Documents numbered 5 and 6. This order required further responses in some instances, and refused to require further responses in others. Both plaintiff and defendant appealed this order, and these appeals are now pending.

However, as to Interrogatories 26 and 27, and Requests for production of Documents 5 and 6, the september 26, 1991, Order required defendant to further respond, and defendant did not appeal this part of the September 26,

1991, order.

As of the time that plaintiff filed his Motion for appropriate Sanctions (on October 31, 1991), defendant had not answered Interrogatories number 26 and 27, and Request for Production of Documents numbered 5 and 6. Defendant did not answer, asserting that , since it had appealed certain other discovery decisions, and "to avoid possible confusion and duplicated efforts", It waited for a ruling on these appeals prior to filing any supplemental discovery answers.

However, defendant has indicated that, "solely to move this case forward and to avoid further time (sic) of the court and the Parties", It has prepared and served supplemental answers to plaintiff's Request for Production of Documents numbered 5 and 6.

Thus, plaintiff now has the discovery which is the subject of his motion for

Appropriate Sanctions.

Defendant's approach to this discovery controversy was quite inappropriate. As to that discovery ordered supplemented by the court, and not appealed, defendant should have responded in a timely fashion.

On the other hand, plaintiff has asked for sanctions in the form of a fine, a default, and orders prohibiting certain defenses. These sanctions Seem too severe Under all the circumstances.

Accordingly, plaintiff's request is denied.

IT IS SO ORDERED.

ENTER THIS 19th DAY OF NOVEMBER, 1991.

James H. ALLEN

United States Magistrate Judge

United States District Court

Order Entry: 137

entry date: 1-2-92

ORDER DENYING PLAINTIFF'S EXCEPTIONS TO MAGISTRATE JUDGE'S ORDER

Page 1 par 1

Plaintiff has excepted to the order Denying Motion for Appropriate Sanctions, entered November 21, 1991. In that order the magistrate judge held that defendant's decision not to properly respond to an un appealed discovery order until other appealed portions of the same order were resolved was "quite inappropriate" and that the discovery "should have been responded [to] in a timely fashion." The magistrate judge, however, denied the requested sanctions as "too severe." the requested sanctions included findings of contempt, fines of $500 per day, judgement by default and the preclusion of defenses. This court cannot find this ruling was clearly erroneous.

PAGE 2 PAR 2-end.

Plaintiff's exceptions are therefore denied.

IT IS SO ORDERED THIS 2nd Day of January, 1992.

Jerome Turner

United States District Judge

Date August 8, 1994